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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

ALCON ENTERTAINMENT, LLC,
a Delaware Limited Liability
Company,

Plaintiff,

v.

TESLA, INC., a Texas Corporation;
ELON MUSK, an individual;
WARNER BROS. DISCOVERY,
INC., a Delaware Corporation;

Defendants.

CASE NO. 2;24-CV-09033-GW-RAO

**PLAINTIFF ALCON
ENTERTAINMENT, LLC’S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT TESLA, INC. AND
ELON MUSK’S MOTION TO
DISMISS ORIGINAL COMPLAINT**

Hearing Date: March 6, 2025

Time: 8:30 a.m.

Courtroom: 9D

Judicial Officer: Hon. George H. Wu

1 **I. INTRODUCTION**

2 Plaintiff Alcon Entertainment, LLC (“Plaintiff” or “Alcon”) has exercised its
3 available right to file a First Amended Complaint (“FAC”) in response to
4 defendants’ motions to dismiss. Fed. R. Civ. P. 15(a)(1)(B) (“Rule 15”). If plaintiff
5 has not yet amended, plaintiff may file an amended pleading as of right not later
6 than 21 days of a defendant’s filing of, *inter alia*, a Fed. R. Civ. P. 12(b)(6) (“Rule
7 12(b)(6)”) motion (or 21 days of a defendant’s filing of a responsive pleading,
8 whichever is earlier). Plaintiff has not yet amended, no defendant has filed any
9 responsive pleading, and it has only been 9 days since defendants filed their Rule
10 12(b)(6) motions, so Plaintiff’s FAC was properly filed by right.

11 Nonetheless, in the interests of progressing the case, and because the Court
12 does have discretion to treat the pending motions to dismiss as directed toward the
13 FAC and still hear them, rather than take them off calendar and wait for defendants
14 to address the FAC (*see, e.g.,* Stevenson, et al., *Rutter Practice Guide – Federal*
15 *Civil Procedure Before Trial (Calif. and 9th Cir. Ed.)*, Ch. 9-D, § 9:263 [April 2024
16 Update]), Plaintiff files short oppositions to both of the pending Rule 12(b)(6)
17 motions. This one is specifically directed to the motion of defendants Elon Musk
18 (“Musk”) and Tesla, Inc. (“Tesla”) (“M&T Motion”).

19 **II. FED. R. CIV. P. 12 (b)(6) STANDARDS AND RULES**

20 Fed. R. Civ. P. 12(b)(6) (“Rule 12(b)(6)”) motions are for legal challenges,
21 not factual challenges. The court thus must take all factual allegations in the
22 complaint that are not legal conclusions as true. *Godecke v. Kinetic Concepts, Inc.*,
23 937 F.3d 1201, 1205 (9th Cir. 2019); *Lee v. City of Los Angeles*, 250 F.3d 668, 679
24 (2001). The court must construe the facts in the most favorable light to supporting a
25 claim, and give plaintiff the benefit of all reasonable inferences from the express
26 allegations. *Id.*; *U.S. v. Corinthian Colleges*, 655 F.3d 984, 991 (9th Cir. 2011);
27 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). The pleading
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1 must demonstrate only facial plausibility, meaning “sufficient factual matter,
2 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Godecke*,
3 937 F.3d at 1208 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell*
4 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Dismissal can lie if the facts,
5 even viewed favorably to Plaintiff, are implausible; for “lack of a cognizable legal
6 theory”; “the absence of sufficient facts alleged under a cognizable legal theory”
7 (*Godecke*, 937 F.3d at 1208), or if the complaint itself alleges facts necessarily fatal
8 to a claim (*Hearn v. R.J. Reynolds Tobacco Co.*, 279 F.Supp.2d 1096, 1102 (D. Az.
9 2003)).

10 The focus of Rule 12(b)(6) analysis “is the complaint,” and, generally, the
11 court “may not consider any material beyond the pleadings in ruling on a Rule
12 12(b)(6) motion.” *Corinthian Colleges*, 655 F.3d at 998-99; *Lee*, 250 F.3d at 688.
13 Nonetheless, the court may consider external material proffered by the movant,
14 pursuant to three isolated exceptions: 1) exhibits to the complaint; 2) documents
15 referenced by the complaint, upon which it “necessarily relies,” and the authenticity
16 of which are undisputed; and 3) matters properly subject to judicial notice.
17 *Corinthian Colleges*, 655 F.3d at 991, 998-999; *Lee*, 250 F.3d at 688.¹

18 **III. RULE 12(b)(6) COGNIZABLE FACTS IF THE PENDING**
19 **MOTIONS GO FORWARD AS IS**

20 The FAC supersedes the original Complaint (“OC”). *Royal Canin U.S.A.,*
21 *Inc. v. Wullschleger*, 604 U.S. ___, 2025 WL 96212 at *7 (January 15, 2025). The
22 FAC’s factual allegations are now controlling for all purposes, including Rule
23 12(b)(6) practice. The FAC pleads the same fundamental dispute alleged in the OC
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25 ¹ To go beyond these exceptions on movant-proffered extrinsic material, the court
26 must treat the motion pursuant to Fed. R. Civ. Pro. 56 (summary judgment),
27 including “giving all parties a reasonable opportunity to present all the material that
28 is pertinent to the motion.” Fed. R. Civ. Pro. 12(d); *Lee*, 250 F.3d at 688.

1 as broadly described above. Among other pleading adjustments, the FAC more
2 finely particularizes which exclusive copyright rights Defendants violated and how.

3 It also makes clear that, although there is only a single infringed work for
4 copyright infringement analysis (the BR2049 motion picture, just like the OC), the
5 Defendants created at least two infringing works: (1) the AI-generated “Presentation
6 Slide 2 Image” (Exhibit C to both the OC and FAC), and also (2) the overall We
7 Robot video presentation (Exhibit 2 to the Omnibus Declaration of Chris Marchese
8 in Support of Defendants’ Motions to Dismiss) (“We Robot Work”), the infringing
9 portions of which are the approximately eleven seconds where the Presentation
10 Slide 2 image is displayed, including Musk’s accompanying voiceover.

11 As to material beyond the FAC itself, Plaintiff sees three formal proffers by
12 Defendants: (1) OC/FAC Exhibits A-C; (2) We Robot Presentation Video; and (3)
13 Purported WBDI-Tesla Location Agreement. Plaintiff’s position on each proffer is:

14 Defendants’ Proffer 1 - FAC Exhibits A, B and C. Plaintiff agrees that the
15 Court may consider all three exhibits on Rule 12(b)(6) practice, in that they are
16 exhibits to the operative pleading. However, if and as it considers FAC Exhibits A
17 and B in particular, the Court must accept what the FAC says they are, and may not
18 credit or accept the substitutional and erroneous analytical sleight of hand the M&T
19 Motion proposes on that point. The M&T Motion’s entire substantial similarity
20 comparison challenge to Plaintiff’s direct copyright infringement claim is premised
21 on the M&T Motion first improperly trying to change Plaintiff’s pleading of the
22 infringed work from the BR2049 motion picture to instead being the set of Exhibits
23 A and B images (“Plaintiff’s Images” in the M&T Motion), and then conducting
24 substantial similarity analysis pursuant to the rules applicable when the infringed
25 work is a photograph. Exhibits A and B are neither themselves the infringed work
26 at issue, nor are they “photographs” in copyright terminology. The infringed work
27 is the larger BR2049 motion picture. Exhibits A and B are all examples of still
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1 images from that motion picture.² Not only does this mean they are not themselves
2 the infringed work, they also are not the same as photographs, either analytically
3 under copyright law³, or as to what displaying them evokes in an audience, all as
4 discussed further herein and in detail in the FAC.

5 Defendants’ Proffer 2 – The We Robot Presentation (Exhibit 2 to Omnibus
6 Declaration of Chris Marchese). Plaintiff agrees that the Court may consider the
7 entire content of the We Robot Presentation on Rule 12(b)(6) practice. It is a
8 document subject to the second exception allowing consideration of extrinsic
9 materials if: “(1) the complaint refers to the document; (2) the document is central to
10 plaintiff’s claim; and (3) no party questions the authenticity of the document.”
11 *Corinthian Colleges*, 655 F.3d at 999; *Lee*, 250 F.3d at 688. For purposes of the
12 pending Rule 12(b)(6) Motions, Plaintiff agrees this document satisfies all three
13 requirements of the exception.

14 Defendants’ Proffer 3 – WBDI-Tesla Location Agreement (Exhibit 1 to
15 Declaration of Rachel Jennings in support of WBDI’s MTD). Plaintiff does not
16 understand the M&T Motion to be proffering this document; rather Defendants
17 proffer it for WBDI’s Motion only. However, to be safe, Plaintiff states its position
18 and objections to this document in the M&T Motion context, too. Plaintiff had
19 never seen the document until Defendants provided it in connection with filing the
20 present Motions. Plaintiff has had no opportunity to conduct discovery or any
21 meaningful investigation regarding it. Plaintiff thus generally does question the
22 document’s authenticity, meaning it does not satisfy any of the exceptions to
23 _____

24 ² The OC Exhibit B included seven images; the FAC’s Exhibit B keeps six of them
25 and adds six more, and also marks them with their time codes in BR2049.

26 ³ Under the Copyright Act, a “photograph” is within the definition of “pictorial,
27 graphic or sculptural work,” while a “still image” of a “motion picture” is treated as
28 part of a “motion picture” and thus under the “audiovisual work” definition. 17
U.S.C. 101.

1 consideration of extrinsic materials and the Court may not consider it. Plaintiff
2 respectfully submits that even if the Court (improperly) decided to consider it, the
3 document seems more affirmative of Plaintiff's theories than dispositive of them,
4 which Plaintiff addresses more in its opposition to WBDI's Motion. The document
5 and arguments which WBDI is making about it also candidly contradict other
6 information Alcon has about the situation.

7 **IV. MISSING PROFFER: THE COPYRIGHT INFRINGED WORK**
8 **ACTUALLY PLED – "BLADE RUNNER 2049" MOTION**
9 **PICTURE**

10 The M&T Motion could have proffered the complete BR2049 Picture which
11 Alcon actually alleges to be its copyright infringed work (both in the OC and still in
12 the FAC) by, for example, lodging a DVD or Blu-Ray version of the entire Picture
13 with the Court. If done properly, Alcon acknowledges that would have been a
14 proffered document meeting all of the requirements of a document referenced in the
15 operative pleading, central to the claims, with unchallenged authenticity. The Court
16 could then potentially conduct a meaningful substantial similarity comparison of
17 BR2049, as the infringed work, to the infringing works. There are at least two
18 infringing works -- the Exhibit C Presentation Slide Image, and the We Robot
19 presentation in recorded form, Exhibit 2 to the February 4, 2025 Omnibus
20 declaration of Chris Marchese. However, for whatever reason, the M&T Motion
21 elected not to put BR2049 – the actually infringed work – before the Court. As
22 discussed below, their pending motion to dismiss Plaintiff's direct copyright
23 infringement claim fails for this reason alone, although not only for that reason.

24 **V. THE M&T MOTION'S CHALLENGE TO PLAINTIFF'S**
25 **DIRECT COPYRIGHT INFRINGEMENT FAILS**

26 The M&T Motion's challenge to Alcon's direct copyright infringement claim
27 rests everything on a Rule 12(b)(6) substantial similarity comparison conducted as if
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1 Alcon was claiming that the infringed work was a set of photographs, rather than a
2 motion picture. The challenge fails, for all of the following reasons, among others:

3 First, as discussed above, the M&T Motion failed to provide the Court with a
4 copy of the actual “Blade Runner 2049” motion picture, which is what Alcon alleges
5 is the “infringed work.” Where the infringed work is not actually before the Court
6 on a Rule 12(b)(6) motion, the Court cannot conduct the comparison.

7 Second, the extrinsic test element filtering analysis which the M&T Motion
8 applied was the filtering analysis applicable when the infringed work is a
9 “photograph.” The infringed work is not a “photograph” or set of photographs, but
10 rather is a “motion picture.” The extrinsic element filtering analysis applicable in a
11 given situation depends on what the infringed work is, not what the infringing work
12 is. The filtering analysis applicable when the work is something like a motion
13 picture requires looking at the elements of plot, themes, dialogue, mood, setting,
14 pace, characters, and sequence of events, and is much more forgiving to the plaintiff
15 than the test applicable where the infringing work is a photograph. *See Rentmeester*
16 *v. Nike, Inc.*, 883 F.3d 1111, 1118-1119 (9th Cir. 2018), overruled on other grounds
17 by *Skidmore as Trustee for Randy Craig Wolfe Trust v. Led Zeppelin*, 952 F.3d 1051
18 (9th Cir. 2020). The M&T Motion does not analyze any of these elements. The
19 FAC pleads them in detail.

20 Third, the M&T Motion conducts no comparison or analysis at all of BR2049
21 against the recorded “We Robot” presentation as an infringing work, and that work
22 is more than a photograph, too, even as to the infringing 11 seconds of Musk’s
23 voiceover of the infringing Exhibit C slide within the presentation.

24 Fourth, other than improperly to try to deny at the Rule 12(b)(6) stage
25 Alcon’s factual allegations, the M&T Motion’s substantial similarity argument fails
26 to address at all Alcon’s claims that Musk and Tesla infringed by literal copying of
27 either: a) the entirety of BR2049 into an AI image generator, or b) of qualitatively
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1 significant protectable elements of BR 2049 into one. A claim of literal copying
2 does not require substantial similarity analysis (because the copying is exact).
3 Moreover, even if it were true that Musk and Tesla created the Exhibit C AI-
4 generated image by using some unidentified “licensed image” as a base (rather than
5 the AI to Musk and Tesla’s knowledge using BR2049 directly), that begs the
6 question of whether the “licensed image” was an infringing copy or derivative work
7 of BR2049. If it was, then by copying from an infringing copy, Musk and Tesla
8 would still be direct infringers. Musk and Tesla’s “preview fact” that the
9 foreground figure in Exhibit C was from a direction to the AI to “add Elon Musk in
10 a duster,” or the like, is belied by the words Musk uses in the presentation to
11 describe the figure: Musk refers to the figure as “he” (*i.e.*, it is not supposed to be
12 Musk and Musk tells the audience as much).

13 **VI. THE M&T MOTION’S ARGUMENTS AGAINST THE FAC’S**
14 **VICARIOUS COPYRIGHT INFRINGEMENT FAIL**

15 The M&T Motion appears to acknowledge that if the acts or fruits of the
16 direct infringing conduct served as, or were used by the secondary liability
17 defendant as, a draw or moving factor for the customers to pay money to the
18 secondary liability defendant, that would be enough to satisfy the direct financial
19 benefit prong of vicarious liability. As laid out in detail in the FAC, the whole point
20 of including the infringements in the presentation was to leverage BR2049’s
21 storytelling power to more effectively push the audience to do what Musk and Tesla
22 wanted: give them money for their cars and car company.

23 **VII. DEFENDANTS MAKE NO INDEPENDENT RULE 12(b)(6)**
24 **CHALLENGE TO PLAINTIFF’S CONTRIBUTORY**
25 **COPYRIGHT INFRINGEMENT CLAIM**

26 The only challenge the M&T Motion makes to Alcon’s contributory
27 copyright infringement claim is that it has to fail if the M&T Motion’s Rule 12(b)(6)
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1 challenge to all direct infringement claims succeeds. Since, as discussed above, the
2 M&T Motion’s challenge to the direct infringement claims is defective in several
3 respects, the contributory copyright infringement claim necessarily survives, too.

4 **VIII. THE M&T MOTION’S CHALLENGE TO PLAINTIFF’S**
5 **LANHAM ACT CLAIM FAILS**

6 The M&T Motion’s Lanham Act claim challenge seems premised mostly on
7 mischaracterizing the allegations as presenting a situation like in *Dastar Corp. v.*
8 *Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) or *Comedy III Productions,*
9 *Inc. v. New Line Cinema*, 200 F.3d 593 (2000), where the goods or services that the
10 defendant is alleged to be improperly marketing with the plaintiff’s marks are
11 expressive works, like a movie. Alcon’s allegations are very plainly that Musk and
12 Tesla are using Alcon’s marks to sell cars. *Dastar* and *Comedy III* are entirely
13 inapposite. *Lions Gate Ent., Inc. v. TD Ameritrade Servs. Co., Inc.*, No. 2:15-
14 05024-DDP-E, 2017 WL 4621541 (C.D. Cal. Oct. 16, 2017) is, respectfully, a
15 troubled opinion where the district court’s reasoning is less than tight or persuasive,
16 and which Alcon contends was wrongly decided. However, even if *Lions Gate* was
17 not wrongly decided, the reason the district court ultimately rested on as to why it
18 was ruling against Lions Gate on false affiliation and false advertising claims was
19 that the good or service that TD Ameritrade was using the “Dirty Dancing” marks
20 and goodwill to sell was financial services, and Lions Gate had not pled that Lions
21 Gate was actually in the business of licensing *Dirty Dancing* for financial services.
22 This is not that kind of case. Alcon has very clearly pled that it has an established
23 business of licensing BR2049 for car partnerships.

24 To the extent that Alcon understands them correctly, the M&T Motion’s
25 arguments that Alcon has not pled ownership of any relevant marks or trade dress is
26 premised on arguing that a claim under 15 U.S.C. § 1125(a)(1)(A) can only be
27 established by pleading and proving defendant’s use of an exact mark owned by the
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1 Plaintiff. That is not the law. The relevant question, likelihood of confusion, is
2 tested under all the circumstances, and looks broadly, not narrowly. *See, e.g.*, the
3 “total effect of [the infringer’s] product and package on the eye of the ordinary
4 purchaser test” applied in cases such as *Warner Bros. Entertainment v. Global*
5 *Asylum, Inc.*, 107 U.S.P.Q.2d 1910, 2012 WL 6951315 at *8 (C.D. Cal. 2012).

6 The M&T Motion also misstates the law in saying that Musk and Tesla’s
7 intention to trade off of Alcon’s mark is not relevant in Lanham Act analysis. That
8 is incorrect. The defendant’s bad faith intent or willful intent is one of the factors in
9 the applicable likelihood of confusion test, which is still the *Sleekcraft* test, *see, e.g.*,
10 *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*, 638 F.3d 1137,
11 1145-46 (9th Cir. 2011).

12 **IX. CONCLUSION**

13 If the Court goes forward with the M&T Motion, it should be denied. If any
14 part of it is granted, Alcon requests leave to further amend.

15 DATED: February 13, 2025

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18 _____
Attorneys for Plaintiff
ALCON ENTERTAINMENT, LLC

20 **CERTIFICATE OF COMPLIANCE**

21 The undersigned, counsel of record for Plaintiff Alcon Entertainment, LLC,
22 certifies that this brief contains 2,786 words, which complies with the word limit of
23 L.R. 11-6.1.

24 

25 _____
Edward M. Anderson